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Supreme Court, U.S.
FILED

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NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

BOYCE MARK GARRETT, LARRY DON KEITH,
KENNETH VERNON RYDEEN, JIMMY DALE SULLIVAN,
MICHAEL DEAN WOODARD, STEVEN CRAIG FINKLEA,
AUSTEEN HARRIS KEITH, and GLENN DALE WILCOX,
Petitioners,

V.

UNITED STATES OF AMERICA,
Respondent

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

I. Under Federal Rule of Criminal Procedure 16(d)(2), may a trial court strike twenty-five (25) government witnesses, as a sanction for its repeated failure to comply with pretrial orders, absent a showing of bad faith?

PARTIES TO THE PROCEEDINGS BELOW

Petitioners Herein

1. Boyce Mark Garrett
2. Larry Don Keith
3. Kenneth Vernon Rydeen
4. Jimmy Dale Sullivan
5. Michael Dean Woodard
6. Steven Craig Finklea
7. Austeen Harris Keith
8. Glenn Dale Wilcox

Party Filing Separate Petition for Writ of Certiorari*

9. Dale Zane Keith

Respondents

1. Assistant United States Attorney David L. Jarvis
2. Assistant United States Attorney Susan B. Cowger

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* Dale Zane Keith is represented by the Federal Public Defender for the Northern District of Texas. As indicated, Mr. Keith is filing a separate Petition for Writ of Certiorari as to the proceedings below. As Mr. Keith is petitioning the Court for the same relief, these defendants will be referred to jointly herein as "Petitioners." Accordingly, the Court may desire to consider these petitions together.

Other Interested Parties

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2. Victor Amador, 900 Jackson St., Suite 600, Dallas, TX 75202, 214-712-9262 (Trial counsel for Steven Craig Finklea)
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6. James Wedding, 103 East Houston, P.O. Box 281, Marshall, Texas 75671 (Trial counsel for Kenneth Vernon Rydeen)
7. Timothy Crook, Esq., Asst. Federal Public Defender, Federal Public Defender, Northern District of Texas, 819 Taylor Street, Room 9A10, Fort Worth, TX 76102, 817-978-2753 (Trial counsel for Dale Zane Keith)

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Petitioners,

V.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioners respectfully pray that a writ of certiorari issue to review the judgment and opinion of the Court of Appeals filed in this action on December 29, 2000, revised January 17, 2001, for which rehearing was denied on February 14, 2001.

OPINION BELOW

The opinion of the Court of Appeals is published at 238 F.3d 293. A copy of the opinion is set out in the Appendix at A-1-22, *infra* ("Panel Op."). The unpublished Order of the Court of Appeals denying rehearing is set out at A-23-24 *infra* ("Panel Rehearing Op."). The District Court's unpublished Order Striking Certain Government Witnesses is set out at A-25-34, *infra* ("Memorandum Op.").

JURISDICTION

Jurisdiction in the district court and in the court of appeals below existed pursuant to 18 U.S.C. § 3231 and 28 U.S.C. § 3731, respectively. The judgment and opinion of the Court of Appeals were originally filed on December 29, 2000 and a revised opinion was filed on January 17, 2001. *See* Appendix A1-22. Petitioners' timely petition for rehearing *en banc* was denied on February 14, 2001. *See* Appendix A-23-24. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

Federal Rule of Criminal Procedure 16(d)(2) provides in relevant part as follows:

> If at any time during the course of the proceedings it is brought to the attention of the court that a party has failed to comply with this rule, the court may order such party to permit the discovery or inspection, grant a continuance, or prohibit the party from introducing evidence not disclosed, or it may enter such other order as it deems just under the circumstances. The court may specify the time, place and manner of making the discovery and inspection and may prescribe such terms and conditions as are just.

F. R. Crim. P. 16 is set out at length at A-35-39, *infra*.

STATEMENT OF THE CASE

A. Proceedings Below

On July 15, 1998, a federal grand jury indicted 29 dairy farmers and others with offenses related to the adulteration of raw milk. The original and superceding indictments alleged that the indictees conspired to defraud the government by (1) obstructing federal milk regulations, (2) adulterating milk in violation of 21 U.S.C. §§ 331(a) and 333(a)(2), and (3) committing mail fraud by causing various checks to be issued for inflated monetary amounts.

On the day of Petitioners' trial, despite three previous continuances, its repeated tardy production of massive materials, and repeated warnings from the trial court, the government produced an 8-inch-stack of approximately 500 documents. These including so-called "target letters," *i.e.*, letters notifying "targets" of criminal prosecution unless they would agree to cooperate and testify. The trial court had specifically ordered all "target letters" of listed witnesses produced not later than two weeks prior to trial. After a lengthy hearing, the government admitted that it had tardily produced "target letters" for twenty-five (25) listed witnesses. On thoughtful consideration, the trial court struck these same witnesses. On interlocutory appeal, the Fifth Circuit vacated the sanctions order and remanded the case for trial.

B. Statement of Relevant Facts

1. An Overview of the Government's Prosecution Scheme

In a complex prosecution scheme, the government alleged a massive, long-term conspiracy by more than 30 dairy farmers and milk transporters to add water to milk along dairy farm routes, in order to increase the weight and value of milk shipments. (Panel Op., at A-3, *infra*.) The factual basis for these charges was intricately woven. The government's theory was that various individuals, including route drivers, added water to the milk trucks along delivery routes. To prove its case, the government intended to rely on scientific data, *e.g.*, test composition reports for the milk tanker trucks, and testimony from cooperating witnesses. (*Id*., at. A-3, *infra*.)

The government also intended to rely on numerous cooperating witnesses, including drivers and processing plant staff members who knew of or participated in the schemes. (*Id*., at A-3, *infra*.) Most of the testifying witnesses whose testimony was excluded by the district court had pleaded guilty in exchange for downward sentencing departure in exchange for their cooperation in testifying in the government's case against the Petitioners. (*Id*., at A-4, *infra*.)

2. Discovery Proceedings and Sanction

The case was initially set for trial on September 28, 1998, but was rescheduled three times, the third for March 19, 1999, with a Feb. 12 discovery deadline. (*Id*., at A-4, *infra*.)

Four days before the March trial date, the district court held a hearing on various matters. On March 12, the court ordered the government to produce to the defense all "target letters" no later than March 17, and continued the trial date to April 5, 2001. (Memorandum Op., at A-27, *infra*.) Specifically, the court ordered as follows:

> It is further ORDERED that no later than 4:00 p.m. on March 17, 1999, the government shall produce to each defendant copies of any letters from government counsel or its agents attempting to secure testimony

from or against any person who will be testifying in the government's case in chief. [*Id.*, at A-27, *infra*; emphasis in original.]

Defense motions requesting relief on the grounds that the government had failed to produce documents, including "target letters", precipitated the order. (*Id.*, at A-27, *infra*.) Previously, the court concluded that these letters were also Brady impeachment material. (*Id.*, at A-27, *infra*.) It also concluded that investigative notes and screening questionnaires containing Brady material should have been produced by the prior, February 12 Brady deadline. (*Id.*) Because of the volume of documents the government tardily produced during the two weeks prior to trial, "and to afford all parties and the Court an opportunity to review those documents and address all issues raised by their production," the court granted a fourth (three-week) continuance, to April 5, 1999. (*Id.*, at A-28-29, *infra*.)

On March 22, Petitioners filed a joint motion for discovery relief under Brady, and the government responded on March 26. On April 1, the trial court denied Petitioners' motion. The court expressed concern about the government's ongoing tardy production of *Brady* material, noting, however, that any "potential constitutional problems with the untimely production" had been cured by the three-week continuance to April 5. The court also noted that it had "seriously considered striking the government's witnesses as a sanction for failing to comply with the scheduling order, but concluded that such a sanction would be a harsher remedy than was warranted." (*Id.*, at A-29, *infra*.) The court "warned the government, however," that it "would be less lenient regarding any future government violations." (*Id.*, at A-29, *infra*.)

The court found that, "apparently simultaneously with the issuance of its last warning, the government was in the midst of commencing another untimely production of documents on the eve of trial." (*Id.*) The government admitted during the April 5 hearing that its April

productions included target letters that should have been produced by March 17. (*Id.*, at 30.) As a result, the court concluded that any witnesses as to whom such letters were to have been produced by March 17 should be stricken. (*Id.*) On April 6, the following day, the government and defense agreed that late production was made on twenty-five (25) witnesses, and the court struck those names, as thus identified by the government. (*Id.*)

In its ten-page opinion, the court stated that in deciding to strike these witnesses, it was mindful of its April 1 "strong admonishment" to the government, a "slap-on-the-hand" warning that proved insufficient. (*Id.*, at A-31, *infra.*) Finding that the warning must be "more severe," the court noted that it was in very similar situation immediately prior to the March 15 trial date necessitating a continuance. (*Id.*) The court made the following statement:

> The court does not question the government's good faith...Obviously, if the Court believed the government had acted in bad faith, the remedy imposed would have been even harsher. But the Court believes that, in light of all the circumstances of this case, the remedy chosen is appropriate even assuming the government acted in good faith. Similarly, even assuming the government's untimely production ultimately would not have adversely impacted the defense's trial strategy, it nonetheless unquestionably adversely impacted the organized and efficient preparation for trial by defense counsel and, for that matter, the Court. Neither the defense nor the Court should be force to continue to suffer the government's last-minute production of documents and the resulting motions and hearings the untimely productions have caused, particularly when those untimely productions have come on days immediately preceding, and even the day of, trial. Indeed, that is exactly what the court-imposed deadlines are designed to prevent.

Yet another continuance of the trial date to avoid any possible prejudice to the defense is simply not a viable option. The court cannot continue to protect the defendants rights and remedy the government's mistakes, even if unintentional, by granting additional continuance, if for no other reason than the problems that would cause to the Court's schedule and the resulting prejudice to other cases that must be continued in order to find another date for this case.

...refusing to grant a brief continuance is also untenable, as it is simply unfair...

* * * *

Furthermore, the government has had more than ample time to finalize its trial preparations...given [three previous continuances]. In light of all the time the government has had to prepare for trial, the fact that it continues to deliver documents to defense counsel that were ordered to be produced weeks ago, at a time when defense counsel should be engaged in the last-minute requirements of pre-trial preparation, is simply inexcusable. The Court would not permit such conduct by defense counsel, and the government, which is seeking to deny these defendants their liberty, certainly should be held to no lesser standard.

...the Court is concerned with fashioning the most appropriate remedy in light of all the circumstances. Had this been the first instance of tardy production, this remedy would be too severe. But this is not the first time the Court has grappled with this issue. The Court has considered less severe sanctions, such as a monetary sanction, but finds that such a remedy would simply be insufficient. The most effective sanction the Court can impose, and the one that seems to the Court to be specifically tailored to the wrong, is striking the witnesses as to whom late production was made... [*Id*. at A-32, *infra*.]

3. 2. The Ruling of the Court of Appeals

The Court of Appeals found that "this appeal boils down to...whether the district court abused its discretion by imposing the rather draconian sanction of excluding the witnesses from trial for discovery violations which the court itself found not to have been made in bad faith." (Panel Op., at A-2, *infra*.)

Despite the trial court's specific findings to the contrary, the Court of Appeals opined that (i) it was "unlikely" that the government's conduct would have hindered the defense (*id*., at A-13, *infra*); (ii) that the trial court "implicitly recognized" that a continuance was a viable option (*id*. at A-13, *infra*); and (iii) that "a brief continuance would not have impacted either the district court's schedule or the defendants ability to efficiently prepare for trial." (*Id*., at A-13, *infra*.) Finally, it also concluded, in blatant disregard of the trial court's findings to the contrary, that (iv) the trial court "fail[ed] to consider whether less extreme sanctions might maintain the integrity of the court" since "other sanctions were available." It thus vacated the trial court's sanction. (*Id*., at A-14, *infra*.)

REASONS FOR GRANTING THE WRIT

I. This Court should resolve the important question of whether a discovery sanction harsher than a continuance imposed under Federal Rule of Criminal Procedure 16(d)(2) requires a finding of bad faith.

A. The Fifth Circuit's ruling in this case abrogates its own controlling precedent and improperly ignores the District Court's findings.

Though the Fifth Circuit has historically applied the four-factor *Sarcinelli* test to evaluate Rule 16(d)(2) sanctions,

doing so under an abuse of discretion standard, it abandoned both of these tests here, adding a bad faith requirement, then conducting its own *de novo* analysis of facts. In doing so, the Fifth Circuit threatens to add to the confusion, injustice and denigration of discretion already present in the numerous and conflicting judicial interpretations of this important standard, including its own.

1. The Fifth Circuit's ruling in this case ignores and confutes its own precedent.

The Fifth Circuit adopted a four-factor test for sanctions under Fed. R. Crim. P. 16(d)(2) in 1982 in *United States v. Sarcinelli*, 667 F.2d 5, 6–7 (5th Cir. Unit B 1982). This test required the district court to "consider several factors: '[1] the reasons why disclosure was not made, [2] the extent of the prejudice, if any, to the opposing party, [3] the feasibility of rectifying that prejudice by a continuance, and [4] any other relevant circumstances.'" (*Id.*) (quoting 8 Moore's Fed. Practice ¶ 16.04(3) (2d ed. 1981)). If the test weighed in favor of sanctions, then "the [district] court should impose the least severe sanction that will accomplish the desired result—prompt and full compliance with the court's discovery orders." (*Id.* at 7.) This test has been repeatedly reaffirmed. *See, e.g., United States v. Katz*, 178 F.3d 368, 372 (5th Cir. 1999) (affirming the district court's exclusion order because the four factors were satisfied).

Heretofore, no Fifth Circuit opinion has imposed a bad faith requirement under the first *Sarcinelli* factor. The Fifth Circuit nonetheless added a bad faith requirement here, for *any sanction harsher than a continuance*.[1]

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[1] The D.C., 1st, 3d, 7th, 9th, and 11th Circuits have also used conflicting and internally conflicting standards, with and without a bad faith requirement, also with little or no explanation. *Cf., United States v. Marshall*, 132 F.3d 63, 70 (D.C. Cir. 1998) (bad faith plus substantial prejudice) with *United States v. Douglas*, 70 F.3d 638 (D.C. Circuit 1995) (unpublished table opinion), *available*

Here, the Fifth Circuit turned to Eleventh and D.C. Circuit authorities cited by the government—both of which require bad faith for sanctions harsher than a continuance—without explanation:

> The government relies on a decision from the D.C. Circuit in which the court held that such a severe sanction as suppression of evidence *would rarely be appropriate when the trial court finds the violation not to have been made in bad faith* and where a less dramatic remedy, such as a continuance, would mitigate any prejudice. [*See United States v. Marshall*, 132 F.3d 63, 70 (D.C. Cir. 1998)... (*Id.* at A-9-10, *infra*; *see also id.* at A-8).]

The implicit rejection of the imposition of any sanction on the government harsher than a continuance in the absence of bad faith provides no objective criterion for analysis. Neither the trial courts nor defendants have adequate notice, indeed any notice, as to the government's ability to avoid sanction where a continuance is available—as surely must almost always be the case. To allow implicit proliferation of this standard warrants or invites substantial confusion in the circuits and prejudicial treatment of accused persons.

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at 1995 WL 650137, **2 (substantial prejudice only); *United States v. Lanoue*, 71 F.3d 966, 973 (1st Cir. 1995) (substantial prejudice only) with *United States v. Richman*, 600 F.2d 286, 292 (1st Cir. 1979) (bad faith plus substantial prejudice); *Government of the Virgin Islands v. Blake*, 118 F.3d 972, 978 (3d Cir. 1997) (multi-factor test) with *United States v. Adams*, 759 F.2d 1099, 1111 (3d Cir. 1985) (substantial prejudice only); *United States v. De la Rosa*, 196 F.2d 712, 717 (7th Cir. 1999) (bad faith plus substantial prejudice) with *United States v. Caudill*, 915 F.2d 294, 299 (7th Cir. 1990) (substantial prejudice only); *United States v. Scholl*, 166 F.3d 964, 972 (9th Cir. 1999) (decisiveness of the evidence and conduct of counsel) with *United States v. Gee*, 791 F.2d 676, 680-81 (9th Cir. 1986) (substantial prejudice only); and *United States v. Perez-Garcia*, 904 F.2d 1534, 1546 (11th Cir. 1990) (substantial prejudice only) with *United States v. Fernandez*, 780 F.2d 1573, 1575 (11th Cir. 1986) (multi-factor test including bad faith).

2. The Fifth Circuit's ruling ignores the facts as found by the District Court and constitutes a *de novo* review.

In short, the Fifth Circuit ignored the applicable standard of review, failed to review the district court's findings under a "clearly erroneous" standard, wrongly conducted a *de novo* review, mischaracterized the record, and overruled the district court's explicit findings in support of its ruling, in direct opposition to controlling Fifth Circuit precedent.[2]

First Sarcinelli Factor. With respect to the first *Sarcinelli* factor—the reason why disclosure was not made—the district court found that the government's conduct, in the face of repeated warnings, was "simply inexcusable." [Memorandum Op., at A-32, *infra*.]

The Fifth Circuit, studiously ignoring this finding, concluded that the "district court explicitly noted that...[the government's] late production was the result of an unintentional mistake." (Panel Op., at A-10, *infra*.) The language above, and the district court's related analysis, clearly demonstrates that it did not find the government's continued violations wholly inadvertent, as the Fifth Circuit suggests. There is a difference between bad faith and inexcusable, but arguably non-malicious, conduct.

Second Sarcinelli Factor. With respect to the second *Sarcinelli* factor—the extent of the prejudice, if any, to the opposing party—the district court also made explicit findings:

> [T]his simply is not the run-of-the-mill criminal case. It involves a large number of defendants remaining to be tried, an even larger number that were indicted, a large volume of documents, detailed

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[2] No Circuit ~~that reviews~~ 16(d)(2) sanctions *de novo*. All have applied an abuse of discretion standard of review —except apparently, the Fifth Circuit in this case.

> mathematical and statistical evidence, and allegations of multiple criminal conspiracies. As a result, this case is more complex than the average criminal case and therefore requires a greater amount of preparation on all counsels' part. [Memorandum Op., at A-28, n. 3, *infra*.]

The trial court found prejudice to the defendants in three instances:

1) At least some of the tardily produced documents were impeachment materials that should have been produced even earlier.

2) Late production prejudiced the defense "even assuming the government's untimely production ultimately would not have adversely impacted the defense's trial strategy, [because] it nonetheless unquestionably adversely impacted the organized and efficient preparation for trial by defense counsel...." As the court recognized, "the mere fact that the government has produced documents forces effective defense counsel to review them."

3) The government's extremely late production put the government at an advantage because it "had had more than ample time to finalize its trial preparations, " while the defense did not. [Memorandum Op., at A-28-29, *infra*.]

Nevertheless, the Fifth Circuit criticized the trial court's "assumption" that the defendants' trial strategy would ~~not~~ be prejudiced. (Panel Op., at A-11-13, *infra*.)

The Fifth Circuit incorrectly stated that the district court had found "no effect" on the defendants' trial strategy and ignored the district court's findings with respect to the tardy production. (*Id*.) In actuality, the district court found prejudice, "*independent of any harm to the defendants' trial strategy,*" and found the tardy production itself would

damage defendants' orderly trial preparation. (Memorandum Op., at A-30-31, n.4, *infra*.)

Third Sarcinelli Factor. With respect to the third *Sarcinelli* factor—the feasibility of rectifying prejudice with a continuance—the district court also made explicit findings. First, the court noted that it had already continued the case to cure prejudice caused by late production and had strongly admonished the government subsequently on April 1. Nonetheless, "the government was in the midst of commencing another untimely production of documents on the eve of trial." (Memorandum Op., at A-29-30, *infra*.) Therefore,

> the remedy for the government's additional violation of the Court's orders must be more severe. And, in assessing the severity of that remedy, the Court recalls that it was in a very similar situation immediately preceding the March 15 trial date, at which time the Court determined that a continuance was necessary to avoid any prejudice to the defense as a result of the government's untimely, eve-of-trial production. The Court is again faced with virtually the same situation. [Memorandum Op., at A-31, *infra*.]

The continuances were having a spillover effect on the court's other cases: "[T]he Court notes that in order to continue this trial from March 15 to April 5, it was forced to continue to October a trial in an almost two-year-old civil case that had been specially set on April 5 six months ago." (Memorandum Op., at A-31, n. 6, *infra*.)

Moreover, the district court specifically "considered less severe sanctions, but [found] that [they] would simply be insufficient." (Memorandum Op., at A-33, *infra*.)

Here again, the Fifth Circuit ignored the district court's findings, asserting that it "implicitly recognized" the viability of a continuance. (Panel Op., at A-13, *infra*.) ~~*Garrett*, 238 F.3d at 300, reproduced at A-13.~~ The problem with this observation is three-fold. First, it ignored the trial

court's explicit findings to the contrary. Secondly, it was drawn from an order that preceded the government's tardy production of 500 documents on the morning of trial. Thirdly, it ignored the district court's analysis specifically rejecting the 'viablility' of another continuance. (Memorandum Op., at A-30-31 (n.s 4, 5, & 6) & A-31, *infra*.)

Fourth Sarcinelli Factor. With respect to the fourth *Sarcinelli* factor—any other relevant circumstances—the district court made three additional findings:

1) "[T]he problems that [another continuance] would cause to the Court's schedule and the resulting prejudice to other cases that must be continued in order to find another trial date for the trial of this cause."

2) The inability to "continue to protect the defendants' rights and remedy the government's mistakes, even if unintentional, by granting additional continuances...."

3) The district court's own inability to properly prepare for trial, due to the government's conduct. [*Id*.]

Again, the Fifth Circuit refused to acknowledge the district court's analysis and instead substituted its own. Instead of considering these *three* additional factors supporting the trial court's decision, the Fifth Circuit ignored them. (Panel Op., at A-14, *infra*.).

The Fifth Circuit here rejected an abuse of discretion standard, in favor of *de novo* review, abrogating its own precedent without explanation.

B. The necessity of a bad faith finding for Rule 16 sanctions should be resolved by this Court in order to eliminate significant intra- and inter-circuit conflicts.

1.3. The Courts of Appeals presently use six different standards for Rule 16 sanctions.

In addition to the intra-circuit inconsistencies discussed *supra* at n. 1, no less than six (6) different standards presently exist. These include multi-factor tests and variations, substantial prejudice, with and/or without ~~and~~ bad faith, and the decisiveness of the evidence, taken together with the conduct of counsel. Allowing these conflicting standards to continue will exacerbate conflicts in the lower courts and will significantly undermine the purpose of the Rule.

a. Substantial Prejudice—the First, Second, and Eleventh Circuits

In *United States v. Perez-Garcia*, 904 F.2d 1534 (11th Cir. 1990), a post-conviction review of a district court's decision not to exclude tardily produced evidence, the Eleventh Circuit held that:

> [v]iolations of Fed. R. Crim. P. 16 and of a standing discovery order will result in reversal of a conviction *only if such a violation prejudiced a defendant's substantial rights*. The degree to which a defendant's rights suffer as a result of a discovery violation is determined by considering how the violation affected his ability to present a defense and, to a lesser degree, the weight of all other evidence introduced. *Id*. at 1546 (citations omitted; emphasis added).[3]

Similarly, the Second Circuit has held that "a 'reversal will only be warranted if the nondisclosure results in *substantial prejudice to the defendant*,'" *United States v. Miller*, 116 F.3d 641, 681 (2d Cir. 1997), quoting *United States*

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[3] While *Perez-Garcia* involves a post-conviction, as opposed to an interlocutory, analysis, the circuits appear to apply the same test in both contexts. *See, e.g., United States v. White*, 846 F.2d 678, 691 (11th Cir. 1988).

v. Sanchez, 912 F.2d 18, 21 (2d Cir. 1990), and describing "substantial prejudice" as "more than that the statement was damaging to the defendant: the defendant must demonstrate that the untimely disclosure of the statement adversely affected some aspect of his trial strategy.'" *Id.* at 681, quoting *United States v. Adenji*, 31 F.3d 58, 64 (2d Cir. 1994); *see also United States v. Lanoue*, 71 F.3d 966, 973 (1st Cir. 1995).

The "substantial prejudice" test confusingly incorporates only *one* element of *Sarcinelli*, while at the same time, imposing a much higher burden, *i.e.*, (a) *demonstration* of (b) *substantial* prejudice that is (c) *more than* damaging, and (d) adversely affects an identifiable aspect of *trial strategy*. This standard is no less confusing, and no more objectively verifiable, by reason of the fact that it requires "more than" damage, *and* an "adverse" impact, on "trial strategy."

b. Bad faith within a multi-factor test—the Fourth, Sixth, and Eight Circuits

The Fourth, Sixth, and Eight Circuits apply a three-factor test, including consideration of the prosecutor's bad faith, with suppression reserved for willful misconduct or incurable prejudice.

For example, in *United States v. Maples*, 60 F.3d 244 (6th Cir. 1995), the Sixth Circuit seemingly applied a three factor test including bad faith for sanctions harsher than a continuance:

> Appellate decisions in this and other circuits have identified several factors which should be considered in deciding whether suppression of evidence is an appropriate remedy to be imposed for a discovery violation. These include: (1) the reasons for the government's delay in producing the materials, *including whether it acted intentionally or in bad faith*; (2) the degree of prejudice, if any, to the defendant; and (3) whether the prejudice to the defendant can be cured with a less severe course of action, such as

granting a continuance or a recess. [*Id.*, at 247; citations omitted; emphasis added.]

That court concluded that suppression must be "*reserved for cases of incurable prejudice or bad faith conduct demanding punishment....*" *Id.* (emphasis added); *accord United* States *v. Hastings*, 126 F.3d 310, 317 (4th Cir. 1997), *cert. denied*, 523 U.S. 1060 (1998); citing *Maples, supra*, 60 F.3d at 247; *see also, United States v. DeCoteau*, 186 F.3d 1008, 1010 (8th Cir. 1999), citing *Hastings*.

This test adds but does not explain the relationship between, yet other elements, including prosecutorial *intent*, *incurable* prejudice, and bad faith conduct *demanding punishment*. The propagation of these somewhat subjective requirements should be discouraged and can only be exacerbated by the case at bar.

c. Tempered bad faith within a multi-factor test—the Tenth Circuit

The Tenth Circuit has facially adopted the three factor test used by the Fourth, Sixth, and Eight Circuits, discussed above. *United States v. Wicker*, 848 F.2d 1059, 1061 (10th Cir. 1988). However, the Tenth Circuit has not limited the consideration of sanctions to only these factors[4], on the basis that a district court might well need to suppress evidence in order "to maintain the integrity and schedule of the court even though the defendant may not be prejudiced." *Id.*, citing *United States v. Campagnuolo*, 592 F.2d 852, 858 (5th Cir. 1979); *United States v. Carrigan*, 804 F.2d 599, 603 (10th Cir. 1986).

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[4] The court noted that these factors should only serve as a guide and did not "dictate the bounds" of the district court's discretion because "'a comprehensive set of standards to guide the exercise of discretion in every possible case' is 'neither necessary or appropriate.'" *Wicker*, 848 F.2d at 1061 (quoting *Taylor v. Illinois*, 484 U.S. 400, 414 (1988)).

In *Wicker*, the Tenth Circuit approved of the imposition of sanctions, notwithstanding the lack of an explicit consideration of bad faith by the trial court, where the reason for delay was insufficient. *Id.* Moreover, the Tenth Circuit approved consideration of "the district court's pressing [trial] schedule, the status of the present case, and the failure of a prior continuance and deadlines to ensure timely discovery . . . [and] that a second continuance would not compensate for the prejudice imposed upon the defendants." *Id.*, at 1062. The Tenth Circuit has recently affirmed this test. *See, e.g., United States v. Charley*, 189 F.3d 1251, 1262 (10th Cir. 1999).

d. Bad faith plus prejudice—the D.C. and Seventh Circuits

The Seventh and D.C. Circuits require a showing of bad faith by the sanctioned party, and substantial prejudice to the aggrieved party; however, neither Circuit has adopted the multi-factor test. The D.C. Circuit has declined to reverse a conviction as "inappropriate" where a showing of prejudice and a showing of bad faith were absent. *United States v. Marshall*, 132 F.3d 63 (D.C. Cir. 1998); *see also United States v. De la Rosa*, 196 F.2d 712, 717 (7th Cir. 1999), citing *Marshall*.

e. Decisiveness of the evidence and conduct of counsel, with a caveat emptor warning—the Third and Ninth Circuits

The Ninth Circuit departs from the mainstream entirely, evaluating Rule 16 sanctions against a defendant's counsel in terms of the decisiveness of the evidence and the conduct of counsel. This approach raises a plethora of new issues, such as "decisive value," "disproportionate conduct" and moderated use of the evidence by the offending party. For example, that Circuit has held:

> The evidence [*i.e.*, canceled checks] was not "of decisive value," nor was the exclusion "disproportionate to the conduct of counsel." Although the checks themselves were not entered into evidence, the information contained on the checks was. [The defendant] was permitted to use the checks to refresh his recollection. The court's determination that [defendant's] failure to disclose the checks was deliberate is supported in the record, and the sanction was directly related to the offending conduct.

United States v. Scholl, 166 F.3d 964, 972 (9th Cir. 1999), citing *United States v. Doran*, 51 F.3d 540, 545 (9th Cir. 1994), quoting in turn from *United States v. Aceves-Rosales*, 832 F.2d 1155, 1157 (9th Cir. 1987) (per curiam).

However, this is not the extent of the Ninth Circuit's position; rather, it has gone further and adopted a caveat emptor approach to sanctions under Fed. R. Crim. P. 16(d)(2). For example, in *United States v. Aceves-Rosales*, 832 F.2d 1155, 1157 (9th Cir. 1987), the Ninth Circuit stated, "The public defender made a strategic decision to withhold the document until after the close of the government's case. He and his client must accept the risk arising from this behavior." *Accord Scholl*, 166 F.3d at 972.

The Third Circuit has adopted yet another approach, although at least conceptually similar to that of the Ninth. In *Government of the Virgin Islands v. Blake*, 118 F.3d 972, 978 (3d Cir. 1997), the Third Circuit utilized a test involving:

> determining [1] what discovery the trial court had ordered; [2] whether, when, and to what extent the government had complied with such orders; [3] the importance of compliance to the case; and [4] the appropriateness of various sanctions.[5]

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[5] Petitioners note that the Third Circuit did not explicitly adopt this four-factor test or reject *United States v. Adams*, 759 F.2d 1099, 1111 (3d Cir. 1985) (requiring prejudice) because the Third Circuit concluded that it did not have jurisdiction in *Blake*. Nonetheless,

The third and fourth factors are roughly analogous to the Ninth Circuit's decisiveness and conduct inquiries.

4. Failing to clarify the requirements for sanctions other than dismissal under Rule 16 will result in disparate treatment of defendants and produce confusion in the lower courts.

These disparate standards can only result in different levels of pretrial discovery, differing trial court assistance, differing levels of cooperation, amorphous or non-existent compliance standards, and ultimately, differing outcomes, based merely on their geographic location. The Order at bar plainly illustrates this problem, as it would be valid in some Circuits while improper on its face in other Circuits.

For example, the Order would be vacated in the Fourth, Sixth, Seventh, Eighth and D.C. Circuits because it did not include a finding of bad faith. Conversely, it might be affirmed in the First, Second, Third, Ninth, Tenth, and Eleventh Circuits—but for radically different reasons in each. The First, Second, and Eleventh Circuits require substantial prejudice for any sanction harsher than a continuance. The district court found that tardy production affected the defendants in three specific ways, in addition to any damage done to the defendants' trial strategy. These harms may fall within the damage to trial strategy and ability to present a defense concerns articulated by those Circuits as comprising substantial prejudice.

The Third Circuit would likely affirm under its four-part test for sanctions, given the government's abject failure to comply with the district court's discovery orders (the second factor), the harm visited upon the Petitioners (the third factor), and the court's findings with respect to the impracticability of a lesser sanction (the fourth factor). The Ninth Circuit might also affirm, given its caveat emptor

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Blake indicates what the Third Circuit will likely do when this issue is squarely presented to it.

approach, in light of the district court's multiple warnings and the previous continuances. Finally, the Tenth Circuit might also affirm, given the apparent need to protect the integrity of the trial court and other pending cases, even in the absence of prejudice.

Confusion in the circuits is already apparent. Shaping and reshaping the law in order to reach predetermined outcomes in multiple circuits has created ill-conceived precedents on a significant issue affecting the validity, uniformity and fairness of criminal prosecutions across the country. Discovery obligations should not vary on this basis, particularly in the criminal context.

C. Requiring bad faith for sanctions under Rule 16(d)(2) conflicts with this Court's decision in *Taylor v. Illinois*.

Requiring bad faith for Rule 16 sanctions other than continuance conflicts with decisions allowing sanctions as a prophylactic measure, and arguably, with this Court's decision in *Taylor v. Illinois*, 484 U.S. 400 (1988).

In *Taylor*, this Court affirmed exclusion of defense witnesses as a sanction for willful disobedience of a discovery order, notwithstanding the defendant's Sixth Amendment right to call witnesses on his own behalf. *See id*. at 410–17. This Court reasoned that

> [p]rejudice to the prosecution could be minimized by granting a continuance or a mistrial to provide time for further investigation. . . .
>
> It may well be true that alternative sanctions are adequate and appropriate in most cases, but it is equally clear that they would be less effective than the preclusion sanction and that there are instances in which they would perpetuate rather than limit the prejudice to the [prosecution] and the harm to the adversary process... [*Id*. at 413.]

Whether *Taylor* applies to exclusion of government witnesses and whether it applies absent willful misconduct are issues that have not been resolved by this Court, and at least two Courts of Appeals have reached differing decisions. *Compare Tyson v. Trigg*, 50 F.3d 436, 445 (7th Cir. 1995), with *United States v. Wicker*, 848 F.2d 1059, 1061 (10th Cir. 1988). Nonetheless, as thiscourt found in *Taylor*, "[t]he rules are empty if they cannot be enforced, and weak if they can be enforced only against willful violators." *Taylor*, 484 U.S., at 413.

Thus, this situation presents this Court with the opportunity to address not only *Taylor's* application to exclusion of government witnesses, but also, the use of prophylactic sanctions for discovery violations *independent* of the Rule. *See, e.g., United States v. D'Antoni*, 856 F.2d 975, 985 (7th Cir. 1988); *Wicker, supra*, 848 F.2d at 1061; *United States v. White*, 846 F.2d 678, 692 n.21 (11th Cir. 1988); *United States v. Euceda-Hernandez*, 768 F.2d 1307, 1313 (11th Cir. 1985); *United States v. Campagnuolo*, 592 F.2d 852, 858 (5th Cir. 1979).

These decisions conflict with the Rule, in that they endorse a concept of prophylactic sanctions which is independent from it, and to which another set of standards applies. Thus, these decisions create yet another source of confusion in this important area. If these cases are not to be controlled by jurisprudence stemming from the Rule, then the courts may enforce exclusionary sanctions not authorized by the rule. The logical outcome of this multifarious analytical framework is further confusion, erosion of discovery rights, emasculation of the authority of the district courts, compromise of the rights of the accused, or some combination thereof.

D. The requirement of a finding of bad faith conflicts with the express language of the Rule.

Requiring bad faith contravenes the express language of the rule. It is well established that rules and statutes should be accorded their plain meaning:

> It is elementary that the meaning of a statute must, in the first instance, be sought in the language in which the act is framed, and if that is plain, and if the law is within the constitutional authority of the law-making body which passed it, the sole function of the courts is to enforce it according to its terms.

Caminetti v. United States, 242 U.S. 470, 485–86 (1917); *see also Hamilton v. Rathbone*, 175 U.S. 414, 421 (1899).

The language of Rule 16 is clear: "[T]he court may order such party to permit the discovery or inspection, grant a continuance, or prohibit the party from introducing evidence not disclosed, *or it may enter such other order as it deems just under the circumstances.*" Fed. R. Crim. P. 16(d)(2) (emphasis added). The Rule thus grants the district courts broad discretion to enforce compliance in any reasonable manner. This broad and comprehensive approach is fitting; multiple authorities confirm this view. "The [Rule] gives wide discretion to the court in dealing with the failure of either party to comply with a discovery order." Federal Rule of Civil Procedure 16(g) 1966 Advisory Committee Notes.

The late Professor Wright agreed: "The first sentence of Rule 16(d)(2) . . . gives the court broad discretion in deciding what should then be done [to address a party's failure to provide discovery.]" Charles Alan Wright, FEDERAL PRACTICE AND PROCEDURE, CRIMINAL 3d, § 260 (2000). Thus, restrictions on this power immediately run afoul of the discretion afforded the district courts.[6]

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[6] This would not be the case if the drafters had stopped with "or prohibit the party from introducing evidence not disclosed" as *expressio unius est exclusio alterius* would prohibit any sanction other than those enumerated. *See* Max Radin, *Statutory Interpretation*, 43 Harv. L. Rev. 863, 874–75 (1930).

The Court's exercise of its discretionary powers in the present case is well within this broad range of discretion. In fact, the sequence of events demonstrates both reasoned restraint and an appropriately gauged series of responses to increasingly inexcusable conduct. First, the trial court ordered the government to produce the outstanding discovery, continuing the case to allow compliance. When the government again failed to comply he took the same approach repeatedly. When a fourth continuance was required, the court granted it, and in doing so, avoided possible constitutional problems created by the government's recalcitrance. Only when the trial court learned that, "simultaneously with the issuance of" specific warnings regarding the potential striking of witnesses, (Memorandum Op., at A-29, *infra*,) the government was "in the midst of commencing another untimely production, *id*., did the trial court, finding such conduct "simply inexcusable," *id*., take the harsh step of excluding witnesses. In doing so, the trial court both noted the potential problems additional continuances might pose for the Petitioners, their counsel, and the court, and rejected any less severe sanction as "simply insufficient." (*Id*., at A-33, *infra*.) Under any reasonable reading of the Rule, the trial court's deliberative, thoughtful, well-reasoned determination of the "most effective" sanction, *id*., should not be disturbed, particularly by way of a review which completely mischaracterizes the trial court's findings of fact.

In a nutshell, a fair reading of the Rule yields results at odds with the decision handed down by the Fifth Circuit, and with the various conflicting standards and interpretations in the other circuits as well.

E. The requirement of a finding of bad faith contravenes the purpose of the Rule.

Restricting the district courts' ability to enforce discovery by imposing a bad faith requirement thwarts this Court's stated objectives for discovery in criminal prosecutions.

This Court has held that:

> the proposition that the ends of justice will best be served by a system of liberal discovery which gives both parties the maximum possible amount of information with which to prepare their cases . . . thereby reduces the possibility of surprise at trial. . . . The growth of such discovery devices is a salutary development which, by increasing the evidence available to both parties, enhances the fairness of the adversary system. [*Wardius v. Oregon*, 412 U.S. 470, 473–74 (1973); *see also Dennis v. United States*, 384 U.S. 855, 871 (1966) (unanimous decision); *Maples*, *supra*, 60 F.3d at 247.]

The Rules Advisory Committee reached the same conclusion:

> [Mandating broad criminal discovery] is done in the view that broad discovery contributes to the fair and efficient administration of criminal justice by providing the defendant with enough information to make an informed decision as to plea; by minimizing the undesirable effect of surprise at trial; and by otherwise contributing to an accurate determination of the issue of guilt or innocence. This is the ground upon which the American Bar Association Standards Relating to Discovery and Procedure Before Trial (Approved Draft, 1970) has unanimously recommended broader discovery.
>
> The requirement that [a] statement be disclosed prior to trial, rather than waiting until the trial, also contributes to the efficiency of administration. It is during the pretrial stage that the defendant usually decides whether to plead guilty. The pretrial stage is also the time during which many objections to the admissibility of types of evidence ought to be made. Pretrial disclosure ought, therefore, to contribute both to an informed guilty plea practice and to a pretrial resolution of admissibility questions. [Fed. R. Crim. P.

16 1974 Advisory Committee Notes (citations omitted).]

In fact, the Advisory Committee intended to set a floor—not a ceiling—for discovery: "The rule is intended to prescribe the *minimum* amount of discovery to which the parties are entitled. It is not intended to limit the judge's discretion to order broader discovery...." (*Id.*) (emphasis added).

So convinced was Professor Wright of full progress on this subject that, in 1982, he declared an end to the debate:

> By 1982, when the Second Edition [of Federal Practice and Procedure] was published, it said that "the debate is much more subdued, if indeed it is not over." *Now that we have entered a new millennium it is clear that the debate is over. [Criminal] [d]iscovery is a matter of course.* [Charles Alan Wright, FEDERAL PRACTICE AND PROCEDURE, CRIMINAL 3D, § 252 (2000).

Regrettably, it appears that Professor Wright was wrong. Since his comment, jurisprudence has moved away from the plain meaning of the Rule at warp speed. In fact, *it appears that only two cases even mention the purposes of Rule 16. See Lanoue, supra*, 71 F.3d at 976–77, citing the Rule's 1966 Advisory Committee Notes; *United States v. Alvarez*, 987 F.2d 77, 84–86 (1st Cir. 1993) (similar). It appears that virtually *all* decisions regarding sanctions imposed on the government under the Rule, including those cited and discussed in this petition, scrupulously ignore the even-handed, broad discovery rationale that fostered its creation.

As this case also amply demonstrates, Rule 16 jurisprudence shows how illusive criminal discovery, as a "matter of course," to coin Professor Right's phrase, really is. Rules will not be complied with 'as a matter of course' unless the trial court can enforce them on the same basis. As the trial found here, where the conduct in issue would not be permitted of defense counsel, "the government, which is seeking to deny these defendants their liberty, should be held to no lesser standard." (Memorandum Op., at A-32,

infra.) The sense of fairness evoked by the trial court's statement was casually discarded by the Fifth Circuit, and, as has been seen, is equally illusive in the other circuits.

F. This Court should exercise its supervisory power in order to protect the authority of the district courts.

> Timothy McVeigh's attorneys may seek to delay his execution, scheduled Wednesday, after being notified that the Justice Department failed to give the defense thousands of FBI reports before trial as required by law. [DALLAS MORNING NEWS, May 11, 2001, p. 1A.]

> "It is now clear that the FBI failed to comply fully with an agreement to hand over all documents in the case," [U.S. Attorney John Ashcroft] said Friday at a news conference. "I want justice to be carried out fairly." [DALLAS MORNING NEWS, May 11, 2001, www.dallasnews.com/ latestnews/364244_ mcveigh11e.html.]

It is common knowledge that mere lip service is often paid to the government's disclosure obligations, by courts and law enforcement authorities alike. The Supreme Court should exercise its supervisory authority to reverse this disturbing trend.

Indeed, perhaps the most troubling aspect of the standards for sanctions under Rule 16 is the implicit power it grants prosecutors. If the only sanction available in the absence of bad faith is a continuance, the district courts' ability to protect a defendant's rights is in doubt.

In this situation a criminal defendant is faced with a Hobson's choice. He may either obtain discovery through repeated continuances (absent a showing, under various interpretations, of bad faith), or have a speedy trial, but not

both. The government may delay his trial—conceivably indefinitely—until it elects to produce the information in question or its conduct becomes so egregious that it actually subjects the government to a more "draconian" sanction, unlikely as that may be.

This problem is especially acute in the circuits that require substantial prejudice. This standard effectively precludes efficient management of criminal cases because in all but the most aggravated cases, the only pretrial option available to the judge in the case of tardy production, even where repeated, is a continuance. In more than a few instances, this may not be enough.

The district court here raised this concern: "The Court cannot continue to protect the defendants' rights and remedy the government's mistakes, even if unintentional, by granting additional continuances...." (Memorandum Op., at A-31, *infra*.) The Fifth Circuit ignored the district court's plight, however, in search of the least severe sanction.

This is a contrived and gerrymandered approach, which, like that of other circuits, is as dangerous as it is wrong. In an important and traveled area of criminal jurisprudence, it sets vague and unattainable standards, invites subjective, retrospective analysis, and is unfairly weighted in favor of the government. This Court should exercise its supervisory power in order to preserve the purpose and meaning of the Rule, the broad discovery policy behind it, and the authority of the district courts to enforce it.

CONCLUSION

For these various reasons, this petition for certiorari should be granted.

Respectfully submitted
This 15th day of May, 2006,

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APPENDIX A

**UNITED STATES OF AMERICA, Plaintiff-Appellant,
VERSUS BOYCE MARK GARRETT; LARRY DON KEITH;
KENNETH VERNON RYDEEN; JIMMY DALE SULLIVAN;
MICHAEL DEAN WOODARD; STEVEN CRAIG FINKLEA;
AUSTEEN HARRIS KEITH; DALE ZANE KEITH; GLENN
DALE WILCOX, Defendants-Appellees.**

No. 99-10531

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

**December 29, 2000, Decided
As Corrected January 17, 2001
Rehearing and Rehearing En Banc
Denied February 14, 2001**

COUNSEL:

For UNITED STATES OF AMERICA, Plaintiff - Appellant: Susan B. Cowger, US Attorney's Office, Dallas, TX.

For BOYCE MARK GARRETT, Defendant - Appellee: Francisco Hernandez, Jr, Fort Worth, TX.

For LARRY DON KEITH, Defendant - Appellee: Thomas W. Mills, Jr, Mills, Presby & Associates, Dallas, TX.

For KENNETH VERNON RYDEEN, Defendant - Appellee: James V. Wedding, Wedding & Hughey, Marshall, TX.

For JIMMY DALE SULLIVAN, Defendant - Appellee: Danny D. Burns, Forth Worth, TX.

For MICAHEL DEAN WOODARD, Defendant - Appellee: Laurance L. Priddy, Aledo, TX.

For STEVEN CRAIG FINKLEA, Defendant - Appellee: Victor Amador, Dallas, TX.

For AUSTEEN HARRIS KEITH, Defendant - Appellee: Braden Wheeler Sparks, Dallas, TX.

For DALE ZANE KEITH, Defendant - Appellee: Timothy William Crooks, Federal Public Defender's Office, Forth Worth, TX.

For GLENN DALE WILCOX, Defendant - Appellee: Kyle Mark Claunch, The Claunch Law Firm, Fort Worth, TX.

JUDGES:
Before HIGGINBOTHAM and DeMOSS, Circuit Judges, and FISH*, District Judge. FISH, District Judge, concurring.

* District Judge of the Northern District of Texas, sitting by designation.

DeMOSS, Circuit Judge:

I. INTRODUCTION

In this interlocutory appeal, the government seeks review of an order of the district court, which was entered the day of trial and which excluded 25 of its witnesses in a complex, multi-defendant conspiracy case involving the alleged adulteration of milk. The district court itself recognized that exclusion of these witnesses was tantamount to a dismissal of some of the charges against the moving defendants. This appeal boils down to one relatively uncomplicated issue; that is, whether the district court abused its discretion by imposing the rather draconian sanction of excluding the government's witnesses from trial for discovery violations which the court itself found not to have been made in bad

faith. For the reasons discussed below, we find that the district court abused its discretion. We, therefore, VACATE the district court's sanctions order excluding the government's witnesses and REMAND this matter for further proceedings.

II. BACKGROUND

The underlying cause of action giving rise to the criminal indictments in this case involves a complex and massive, long-term conspiracy in which more than 30 dairy farmers and milk transporters allegedly added water to milk shipments along various and overlapping dairy routes in order to increase both the weight and value of milk shipments. The indictment described how Associated Milk Producers, Inc. ("AMPI"), which is a marketing corporation for dairy farmers, operates a milk processing plant in Sulphur Springs, Texas, to which drivers it hired would bring milk from individual dairy farms along each driver's specified route. The route drivers had the responsibility of measuring the quantity of milk received from each dairy farm and had to take samples of each shipment received from each farm before commingling the milk in the tanker truck. Once delivered to the processing plant, the milk was to be tested under standards put forth by the Milk Marketing Administration ("MMA"), which is a subdivision of the U.S. Department of Agriculture.

The government's theory was that various individuals, including route drivers, added water to the milk trucks along delivery routes. To prove its case, the government intended to rely on both scientific data, that is, sample test composition reports for the milk tanker trucks, and testimony from cooperating witnesses. These witnesses were drivers and other AMPI staff members who knew of or were aware of the defendants' schemes to water down the milk. Most of the testifying witnesses whose testimony was ultimately excluded by the district court were defendants

who pleaded guilty to one count of the indictment in exchange for dismissal of the remaining counts against them and for consideration of a downward sentencing departure in light of their willingness to cooperate and testify truthfully in the government's case against the remaining defendants.

Along with substantive violations of specific milk adulteration statutes, specifically 21 U.S.C. §§ 331 (a), 331(a)(2), the indictments charged substantive mail fraud violations and various conspiracies to: 1) defraud the government by obstructing milk regulation; 2) violate the milk adulteration statutes; and 3) commit mail fraud. The initial indictment, entered on July 15, 1998, charged 29 defendants with these various milk adulteration-related offenses.

The case was initially set for trial on September 28, 1998, but was rescheduled for November 30, 1998, then for January 11, 1999, and then again for March 15, 1999 (with a February 12th deadline for discovery).[1] On January 13, 1999, a superseding indictment was returned naming four additional defendants,[2] and on March 3, 1999, a second

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[1] By November 1998, as a result of numerous guilty pleas, only five defendants remained in the case (Appellees Garrett, Larry Don Keith, Rydeen, Sullivan, and Woodard). The original indictment was returned in July 1998. In August 1998, fourteen defendants pleaded guilty; in September, four more pleaded guilty; in October, two more pleaded guilty; in November, three more pleaded guilty; and one more defendant was dismissed from the indictment by virtue of his wife having entered a guilty plea. Each of these defendants agreed to cooperate with the government, and all bargained to have their sentencing hearings postponed until after dispositions had been reached with respect to all defendants charged in the indictments. Each was presumably hoping for a 5K1.1 downward departure based on substantial assistance.

[2] These additional four were Finklea, Austeen and Dale Keith, and Wilcox. Combined with the five remaining defendants as of November 1998, those being Garrett, Larry Don Keith, Rydeen, Sullivan, and Woodard, *see supra* note 1, we have our nine named appellees.

superseding indictment was returned. Four days before the March 15th trial date, the district court held a hearing on various motions, and the following day, March 12th, it entered an order continuing the trial once again to April 5th. The matters addressed in the March 11th hearing dealt with allegations that the prosecutor declined to produce letters written to people who were not expected to testify at trial ("target letters"), urging them to admit their involvement to get the benefit of cooperation at sentencing, and that the prosecutor also declined to provide investigators' notes of interviews with or questionnaires as to approximately 125 people, in some of which various defendants denied any involvement, a position which was inconsistent with their pleas and which, therefore, constituted impeachment material that should have been disclosed. In its March 12th order, the district court directed the government to produce within five days of that order, copies of "any [target] letters from government counsel or its agents attempting to secure testimony from or against any person who will be testifying in the government's case-in-chief . . . ." The district court also continued the trial until April 5th to permit production of these materials. On March 16th and 17th, the government produced some materials in response to the March 12th order. On March 31st, and in response to a defense motion that *all* correspondence with *any* individuals, not just correspondence related to testifying witnesses, be produced, the district court removed the "case-in-chief" limitation of its March 12th order and ordered that *all* such target letters be produced by April 2nd.

On March 23rd, all of the defendants-appellees had also moved jointly for relief under *Brady*,[3] claiming that the government had withheld numerous categories of exculpatory materials, including the letters referenced in the March 12th order. On April 1st, the district court denied the defendants' motion, noting that none of the materials cited

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[3] *Brady v. Maryland*. 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963).

by the defendants constituted *Brady* material for which the government had an affirmative duty to disclose. The district court did note, however, that the investigators' notes and screening questionnaires were to be produced as "*Brady* impeachment material" because they revealed potentially inconsistent statements made by the various defendants. Yet, no defense counsel ever denied having been been [sic] told by the prosecutor about these items and their content.

Late on April 2nd, the government produced documents to the defense as directed by the district court's March 31st modification of its March 12th order. The government supplemented this production on the morning of April 5th (the trial date) with a stack of documents (8 inches thick), a good portion of which was duplicative of previously provided materials. Defense counsel complained to the district court about the tardy production, and while some conceded that a brief continuance would suffice to take the sting out of the delayed production, others requested a dismissal based on discovery violations.

On April 5th and 6th, the district court held additional hearings on the defendants' various motions to dismiss or for sanctions regarding the government's alleged failure to timely produce discovery materials, and it ultimately struck 25 of the government's witnesses on the afternoon of the 5th. The district court ordered excluded from trial any witness as to whom a target letter was required to be produced by the court's March 12th order (requiring production by March 17th), but as to which such letter was tardily produced. The court noted that after the March 11th hearing, it had determined, and the government should have been aware that, such target letters were *Brady* materials which it had an obligation to produce.[4] The district court did not sanction

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[4] We note that this is inconsistent with the fact that, in its April 1st order, the district court explicitly held that the target letters, as one of the categories of materials for which the defendants' decried a failure to disclose, were not *Brady* materials. Thus, the government cannot be said to have been on notice that such letter were even *Brady* materials until the district court entered its order

the government's failure to timely disclose the materials ordered produced after April 2nd under the March 31st modification of the March 12th order (i.e., the addition of any target letters to non-testifying witnesses and the addition of the investigators' notes). A written order to the effect of the sanctions orally ordered was entered on April 9th, and in it, the district court stated "the court does not question the government's good faith." The district court went on to state:

> even assuming the government's untimely production ultimately would not have adversely impacted the defense's trial strategy, it nonetheless unquestionably adversely impacted the organized and efficient preparation for trial by defense counsel and, for that matter, the Court. Neither the defense nor the Court should be forced to continue to suffer the government's last-minute production of documents and the resulting motions and hearings the untimely productions have caused, particularly when those untimely productions have come on days immediately preceding, and even the day of, trial.

The government has timely filed this interlocutory appeal of the district court's sanctions order, arguing that the district court abused its discretion by imposing a sanction more severe than was necessary to effect compliance with discovery orders and by failing to weigh all of the factors required by this Circuit's precedent.

III. STANDARD OF REVIEW

We review a district court's imposition of sanctions for discovery violations for an abuse of the district court's discretion. *See United States v. Katz*, 178 F.3d 368, 372 (5th Cir. 1999). The government concedes that the district court's discretion is "admittedly broad." However, notwithstanding

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on March 12th requiring disclosure within five days thereafter.

this broad discretion, we have consistently held that a district court, when considering the imposition of sanctions for discovery violations, must carefully weigh several factors, and if it decides such a sanction is in order, it "should impose the least severe sanction that will accomplish the desired result - prompt and full compliance with the court's discovery orders." *United States v. Sarcinelli*, 667 F.2d 5, 7 (5th Cir. Unit B 1982); *see also Katz*, 178 F.3d at 372.

IV. DISCUSSION

As we noted in *Sarcinelli* and *Katz*, a district court exercising its discretion and considering the imposition of sanctions for discovery violations should consider the following factors: 1) the reasons why disclosure was not made; 2) the amount of prejudice to the opposing party; 3) the feasibility of curing such prejudice with a continuance of the trial; and 4) any other relevant circumstances. *See Katz*, 178 F.3d at 371 (citing *United States v. Bentley*, 875 F.2d 1114, 1118 (5th Cir. 1989)). And as noted above, in fashioning any such sanction, the district court should impose only that sanction which is the least severe way to effect compliance with the court's discovery orders. *Id.*

The government relies heavily on a decision from the Eleventh Circuit extolling the principles of *Sarcinelli*, which, though not controlling, is instructive. In *United States v. Euceda-Hernandez*, 768 F.2d 1307 (11th Cir. 1985), the court noted that by suppressing governmental evidence in lieu of granting a continuance or recess, "a trial judge may achieve a speedier resolution . . . and reduce his docket, but he does so at the expense of sacrificing the fair administration of justice and the accurate determination of guilt and innocence." *Id.* at 1312. In the government's view, the district court's striking of 25 of its witnesses, which the district court itself recognized could have the effect of eviscerating the criminal indictment, was "tantamount to a dismissal of charges . . . [and constituted] an undeserved windfall to parties who

were duly indicted based on probable cause to believe they had committed federal crimes." The government urges that if it violated any discovery order at all, it acted in good faith, and that there was no measurable prejudice to the defendants which could not have been cured by a short continuance. Finally, the government urges that less severe sanctions, such as personal sanctions against the prosecutor, could have achieved the goal of compliance with discovery orders.

The defendants counter that the district court did not even go far enough, as some sought dismissal of the indictment as a sanction. And likewise, the defendants do not feel that any less severe sanction would suffice to ensure that the government would comply with the district court's discovery orders. The defendants contend that the record shows a pattern of misconduct by the government that makes the sanctions chosen by the district court mild, and they further contend that the sanctions were a valid exercise of the district court's power to sanction discovery violations "as a prophylactic and punitive measure."

To determine whether the district court abused its discretion, we must evaluate the exercise of discretion in light of our precedent requiring that the district court fully and thoughtfully addressed each of the *Sarcinelli* factors noted.

A. Reasons for non-disclosure

We first consider the government's reason for not timely producing target letters for the 25 excluded witnesses. The government explained to the district court that its failure to more timely provide the target letters resulted from the fact that the letters were in a separate binder that had been overlooked during initial disclosures. As noted above, the district court explicitly noted that the government did not violate its discovery orders in bad faith and that its late production was the result of an unintentional mistake. Indeed, no improper motive was attributed to the

government's tardy production.

The government relies on a decision from the D.C. Circuit in which the court held that such a severe sanction as suppression of evidence would rarely be appropriate when the trial court finds the violation not to have been made in bad faith and where a less dramatic remedy, such as a continuance, would mitigate any prejudice. *See United States v. Marshall*, 328 U.S. App. D.C. 8, 132 F.3d 63, 70 (D.C. Cir. 1998). We note also that in our own decision in *Sarcinelli*, we found the prosecutor's *complete* failure to provide discovery at all to be contumacious, but nevertheless, not deserving of the harsh sanction of exclusion tantamount to a dismissal where a less severe sanction such as jailing the prosecutor or granting a continuance was available.

The district court's own finding that the government's tardy disclosure was not in bad faith militates against the imposition of a sanction so severe as to effectuate a dismissal of the charges against certain defendants, especially where as discussed below, other, less severe sanctions were available to mitigate against the minimal prejudice suffered by the defendants in this case.

The defendants rely on what they characterize as a pattern of disclosure abuses, which indicates that the government's untimely disclosure was an intentional move designed to overwhelm the defendants at the last minute so as to prevent them from being able to utilize the disclosed target letters. Despite the defendants' characterization of their 21 separate requests for discovery throughout the many continuances of this case, the defendants overlook the abundance of materials that were in fact timely produced by the government and the fact that, as the district court noted, the failure to timely provide the target letters as to the 25 witnesses was the result of an unintentional mistake. We conclude that the district court's own findings are dispositive of the good faith issue and that the reason for non-disclosure was a mistake made in good faith.

B. Prejudice to the defendants

The second *Sarcinelli* factor we must consider is whether the defendants were unduly prejudiced by the tardy disclosure. The district court assumed that the late production would not prejudice the defendants' trial strategy, but it found that tardy disclosure so close to the commencement of the trial "adversely impacted the organized and efficient preparation for trial by defense counsel and . . . the Court," because it required the filing of motions and the scheduling of hearings.

We note that even though trial was set to commence on April 5th, the district court had already scheduled, at one defense attorney's request, a recess from Tuesday the 6th until Thursday the 9th, to accommodate the attorney's scheduled appearance for oral argument before this Circuit. The government properly notes that the prejudice referred to in *Sarcinelli* is prejudice to the defendants' *substantial rights*, that is, injury to their right to a fair trial, and that prejudice does not encompass putting trial preparation into minor disarray. *See United States v. Webster*, 162 F.3d 308, 336 (5th Cir. 1998), *cert. denied*, 528 U.S. 829, 145 L. Ed. 2d 70, 120 S. Ct. 83 (1999); *see also United States v. Neal*, 27 F.3d 1035, 1050 (5th Cir. 1994). As we noted in our decision in *United States v. Martinez-Perez*, 941 F.2d 295, 302 (5th Cir. 1991), the question of prejudice is whether the defendant had time to put the information to use, not whether some extra effort was required by defense counsel.

Additionally, even if the district court determines that the information was disclosed too late to be put to effective use, the court must also determine that the lack of information created a reasonable probability that the result would have been different. *See Kyles v. Whitley*, 514 U.S. 419, 115 S. Ct. 1555, 131 L. Ed. 2d 490 (1995). In order to determine in this case whether the result would have been different, the district court should have considered all of the materials that were in fact produced to evaluate whether the target letters would have made a difference; however, when the

government attempted to make a record of the cumulative nature of the target letters to show that the prejudice, if any, was minimal, the district refused to grant it an opportunity to do so because of the government's "admission" of a discovery violation and the district court's assumption that damage to the defendants' case was not *necessary* to support the sanction.[5] We have repeatedly held that no prejudice exists when suppressed or newly discovered evidence is cumulative. *See, e.g., United States v. Lowder*, 148 F.3d 548, 551 (5th Cir. 1998); *Allridge v. Scott*, 41 F.3d 213, 217-18 (5th Cir. 1994).

The precise materials that were deemed to be a discovery violation in this case were 23 simple target letters to 23 witnesses, a draft immunity agreement with a 24th witness, and a target letter with a proposed offer agreement for a 25th witness. Among the information already in the hands of the defendants at the time these materials were tardily produced were the following: as to 7 of the 25, the defense had other target letters with the same message; as to those 7 plus 12 more, the defense had threatening and coercive correspondence following up on target letters; and as to 21 of the 25, the defense knew that they had pleaded guilty and struck deals with the government and these 21 defendants' plea agreements, including the dismissal of charges and the stated possibility of a § 5K1.1 motion, were known to the defense. Quite simply, it should have come as no surprise to the defense that the pleading defendants had previously received target letters encouraging them to plead guilty. As we noted in *Webster*, where a defendant is impeached with his plea agreement and his memorialized hope for a reduced sentence, additional information regarding anticipated favors from the government in exchange for cooperation is cumulative impeachment material that is not prejudicial if untimely or undisclosed. *See Webster*, 162 F.3d at 337-38.

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[5] This assumption contravenes the second *SarcinelliError! Bookmark not defined.* factor requiring a full consideration of actual prejudice.

We find it highly unlikely that the failure to have the undisclosed materials would have hindered the defense's ability to impeach the 25 excluded witnesses regarding their prior deals with the government, which deals might call in to question their motivation for testifying against the remaining defendants. In our view, the district court completely overlooked the additional evidence that renders the target letters cumulative and, thus, a minimizing factor of the prejudice suffered by the defendants.

C. Curing prejudice with a continuance

The district court itself acknowledged in its April 1st order denying the exclusion of various witnesses on *Brady* grounds that continued violations of its discovery deadlines and scheduling orders, in addition to "wreaking havoc" on the defense's and the Court's ability to efficiently prepare for trial, "might require additional continuances of the trial date." In doing so, the district court implicitly recognized that a continuance was a viable and likely consequence of tardy disclosure.

Additionally, most of the defense attorneys conceded to the district court that if there was going to be a continuance, it would only need to be for two or three days. Furthermore, as the sanctioned materials were scheduled to be produced by 5:00 p.m. on Friday, April 2nd, only two days prior to the actual disclosure on Monday the 5th (the scheduled day of trial), and as the district court had already planned to recess the trial from Tuesday the 6th through Thursday the 8th, we conclude that a brief continuance of several days would not have impacted either the district court's schedule or the defendants' ability to efficiently prepare for trial.

In light of the absence of bad faith on the part of the government, the minimal amount of substantive prejudice because of the cumulative nature of the tardily disclosed materials, and the availability of a much less severe sanction than striking witnesses with the effect of eviscerating the government's case, we find that the district court could most

certainly have eliminated the minor prejudice with either a brief delay or a less severe sanction.

D. Other relevant factors

Sarcinelli lastly requires that the district court also consider those additional matters which are relevant to a determination of whether sanctions are appropriate. The government presents one main, but persuasive point regarding this factor, which is that allowing such a harsh sanction to stand in these circumstances essentially obliterates its case against individuals who were duly indicted based upon probable cause to believe they committed crimes against the government. As we have stated, a district court "exceeds the proper bounds of its power to order dismissal of an indictment . . . when it fails to consider whether less extreme sanctions might maintain the integrity of the court without punishing the United States for a prosecutor's misconduct." *United States v. Welborn*, 849 F.2d 980, 985 (5th Cir. 1988) (citing *Sarcinelli*, 667 F.2d at 6-7)). Here, we conclude that the exclusion of these 25 witnesses, with the effect of eliminating or substantially diminishing the government's case against the defendants-appellees, was an excessive sanction and an abuse of the district court's discretion, especially where a brief continuance would have cured any prejudice and other sanctions were available to ensure that the prosecutor would comply with the district court's discovery orders.

V. CONCLUSION

Based upon our full consideration of the *Sarcinelli* factors, which should have guided the district court's decision on sanctions, we conclude that the district court abused its discretion in excluding 25 of the government's witnesses. The government acted not in bad faith, the prejudice to the defendants was minimal in light of the cumulative nature of the untimely disclosures, and any prejudice could have been

cured with a brief continuance. For these reasons, we VACATE the district court's order of sanctions and REMAND this matter for such further proceedings as are appropriate.

VACATED and REMANDED.

FISH, District Judge, concurring:

Because I believe there were no "discovery" violations in this case, I readily agree with the majority that the district court abused its discretion by imposing the sanction of excluding twenty-five witnesses for the government. I am troubled, however, by the majority's uncritical acceptance of the parties' arguments that this is a "discovery" dispute to which the analysis of cases such as *United States v. Sarcinelli*, 667 F.2d 5 (5th Cir. 1982), and *United States v. Katz*, 178 F.3d 368 (5th Cir. 1999), may be applied. Those cases construct an analytical framework for the imposition of sanctions under Rule 16, F.R. CRIM. P., which -- by its terms at least -- is not applicable in this situation.[6]

Rule 16 is entitled "Discovery and Inspection." If that rule were applicable, the pertinent part would be subsection (a), which is denominated "Governmental Disclosure of Evidence." Subsection (a) in turn is divided into two parts: "(1) Information Subject to Disclosure" and "(2) Information Not Subject to Disclosure." The information "subject to disclosure" in part (a)(1) falls into five categories: "(A) Statement of Defendant"; "(B) Defendant's Prior Record"; "(C) Documents and Tangible Objects"; "(D) Reports of Examinations and Tests"; and "(E) Expert Witnesses." All other documents in the possession of the government, by virtue of Rule 16(a)(2) ("Information Not Subject to Disclosure"), are -- except as otherwise required by the Jencks Act, 18 U.S.C. § 3500 -- non-discoverable.

The "target" letters here are not described by any of the categories in Rule 16(a)(1). The defendants, apparently cognizant of this fact, did not seek the letters under the aegis of Rule 16 but under the principles of *Brady v. Maryland*, 373 U.S. 83, 10 L. Ed. 2d 215, 83 S. Ct. 1194 (1963). *Brady* and

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[6] Rule 16(d)(2) authorizes the imposition of sanctions for failure "to comply with this rule."

its progeny, however, arise not in the context of pretrial criminal discovery but in post-judgment collateral review of criminal convictions. *See United States v. Agurs*, 427 U.S. 97, 103, 49 L. Ed. 2d 342, 96 S. Ct. 2392 (1976) ("The rule of *Brady v. Maryland* . . . arguably applies in three . . . situations. Each involves the discovery, *after trial* of information which had been known to the prosecution but unknown to the defense.") (emphasis added). The *Brady* line of cases announces no rule of discovery but the self-executing constitutional rule that due process requires disclosure by the prosecution of evidence favorable to the accused that is material to guilt or punishment.[7]

In a subsequent gloss on *Brady*, the Supreme Court has noted that "an interpretation of *Brady* to create a broad, constitutionally required right of discovery would entirely alter the character and balance of our present system of criminal justice." *United States v. Bagley*, 473 U.S. 667, 675 n.7, 87 L. Ed. 2d 481, 105 S. Ct. 3375 (1985) (internal quotation marks and citation omitted). This Court too has recognized both that *Brady* "is not a pretrial remedy," *United States v. Scott*, 524 F.2d 465, 467 (5th Cir. 1975), and that *Brady* is not "applicable at pre-trial stages." *United States v. Frick*, 490 F.2d 666, 671 (5th Cir. 1973), *cert. denied*, 419 U.S. 831 (1974). It has also stated that "*Brady* is not a discovery rule, but a rule of fairness and minimum prosecutorial obligation." *United States v. Beasley*, 576 F.2d 626, 630 (5th Cir. 1978), *cert. denied*, 440 U.S. 947, 59 L. Ed. 2d 636, 99 S. Ct. 1426 (1979).

Rule 16, of course, explicitly requires *pretrial* discovery and production of the material described in the rule, while

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[7] *See United States v. Washington*, 669 F. Supp. 1447, 1451 (N.D. Ind. 1987):

> The constitution requires the prosecution to observe this right [*i.e.*, the right under *Brady* to disclosure of exculpatory or mitigating evidence] with vigilance: a court order is unnecessary since the duty to protect the right already exists. An order to produce *Brady* materials makes as little sense as an order to preserve the accused's right to be free from unreasonable searches and seizures.

Brady, because it is not a discovery rule, contains no such timing requirements. *United States v. Harris*, 458 F.2d 670 (5th Cir.), *cert. denied*, 409 U.S. 888 (1972), highlights the importance of this distinction. There, the defendants contended that the prosecution violated *Brady* by not producing to them before trial the written statement of government witness John L. Johnson, who was, in the language of the opinion, a "conspirator-turned-accuser." 458 F.2d at 675. The defendants claimed prejudice as a result of the non-production because they did not know the substance of Johnson's testimony before trial and because there was a conflict between Johnson's testimony and that of another government witness regarding the whereabouts of one of the defendants, thereby raising an issue of Johnson's credibility. *Id*. This Court held, however, that there was no obligation under *Brady* to produce the statement before trial, since the Jencks Act made it producible only after Johnson testified. *Id*. at 675-76. While the statement of the witness in *Harris* was surely as valuable to the defense for impeachment as the "target" letters at issue here, this Court found, as a matter of law, that no *Brady* violation had occurred.

The distinction between Rule 16 and *Brady* as the basis of disclosure is also significant because the question of whether Rule 16 has been violated can be determined before or during trial, and appropriate sanctions imposed in the manner prescribed by the rule. *See* Rule 16(d)(2), F.R. CRIM. P. With the backward-looking focus of *Brady*, however, whether a *Brady* violation has occurred,[8] indeed whether the government even had a *Brady* obligation,[9] can only be

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[8] *See United States v. Starusko*, 729 F.2d 256, 261 (3rd Cir. 1984):

> We recognize that, generally, it is difficult to analyze, prior to trial, whether potential impeachment evidence falls within *Brady* without knowing what role a certain witness will play in the government's case.

[9] In its latest pronouncement on *Brady*, *Kyles v. Whitley*, 514 U.S. 419, 131 L. Ed. 2d 490, 115 S. Ct. 1555 (1995), the Supreme Court emphasized the discretion of the prosecutor, not the trial judge, in deciding what evidence is producible under *Brady*:

> The Constitution is not violated every time the government fails or chooses not to disclose evidence that might prove helpful to the defense. We have never held that the Constitution demands an open file policy . . . and the rule in *Bagley United States v. Bagley*, 473 U.S. 667, 87 L. Ed. 2d 481, 105 S. Ct. 3375 (1985), one of *Brady's* progeny] . . . requires less of the prosecution than the ABA Standards for Criminal Justice, which call generally for prosecutorial disclosures of any evidence tending to exculpate or mitigate.
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> While the definition of *Bagley* [and hence *Brady*] materiality in terms of the cumulative effect of suppression must accordingly be seen as leaving the government *with a degree of discretion*, it must also be understood as imposing a corresponding burden. On the one side, showing that the prosecution knew of an item of favorable evidence unknown to the defense does not amount to a *Brady* violation, without more. But the prosecution, which alone can know what is undisclosed, must be assigned the consequent responsibility to gauge the likely net effect of all such evidence and make disclosure when the point of "reasonable probability" [*i.e.*, that disclosure of the evidence would produce a different outcome] is reached.
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> Even if due process were thought to be violated by every failure to disclose an item of exculpatory or impeachment evidence . . ., the prosecutor would still be forced to make judgment calls about what would count as favorable evidence, owing to the very fact that the character of a piece of evidence as favorable will often turn on the context of the existing or potential evidentiary record. Since the prosecutor would have to exercise some judgment even if the State were subject to this most stringent disclosure obligation, it is hard to find merit in the State's complaint over the responsibility for judgment under the existing system, which does not tax the prosecutor with error for any failure to disclose, absent a further showing of materiality.
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> This means, naturally, that a prosecutor anxious about tacking too close to the wind will disclose a favorable piece of evidence. *See Agurs, 427 U.S. at 108* ("The prudent prosecutor will resolve doubtful questions in favor of disclosure").

Id. 514 U.S. at 436-37, 439 (emphasis added) (some citations omitted).

determined after the trial is over.[10] This is true because disclosure under *Brady* is required only if the evidence is material, but materiality can be judged only in hindsight, in the context of all the evidence presented. *See Agurs*, 427 U.S. at 112-13 (evidence is material if its omission creates a reasonable doubt that, in light of the record as a whole, did not otherwise exist); *Kyles v. Whitley*, 514 U.S. 419, 433-37, 131 L. Ed. 2d 490, 115 S. Ct. 1555 (1995) (evidence is material if its omission, when the entire record is considered, "undermines confidence in the outcome of the trial."); *Porretto v. Stalder*, 834 F.2d 461, 464 (5th Cir. 1987) ("Omitted evidence is deemed material when, viewed in the context of the entire record, it creates a reasonable doubt as

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These passages clearly place responsibility on the *prosecutor*, rather than the trial judge, to determine not only *whether* a given piece of evidence should be produced but also *when* (*i.e.*, "when the point of 'reasonable probability' [of a different outcome] is reached.").

[10] One court has gone so far as to say that "generally, a defendant must be tried and convicted before any due process violation [under *Brady*] becomes of consequence." *Commonwealth of Northern Mariana Islands v. Campbell*, 4 N. Mar. I. 11, 15, 1993 WL 614809 at *3 (Sup. Ct. N. Mariana Isl. July 22, 1993), *aff'd*, 42 F.3d 546 (9th Cir. 1994). Other courts, while not going so far, say that the right to due process is not violated if the *Brady* material is disclosed in time for the defendant to use it effectively at trial, even if the material should have been disclosed earlier. *United States v. O'Keefe*, 128 F.3d 885, 898 (5th Cir. 1997), *cert. denied*, 523 U.S. 1078 (1998); *United States v. Ellender*, 947 F.2d 748, 757 (5th Cir. 1991); *United States v. Campagnuolo*, 592 F.2d 852, 860-61 (5th Cir. 1979). *See also United States v. Kubiak*, 704 F.2d 1545, 1549-50 (11th Cir.) (in determining whether nondisclosure of exculpatory information constituted a denial of due process, "the focus is not upon the fact of nondisclosure, but upon the impact of the nondisclosure on the jury's verdict."), *cert. denied*, 464 U.S. 852, 78 L. Ed. 2d 149, 104 S. Ct. 163 (1983); *United States v. Starusko*, 729 F.2d 256, 262 (3rd Cir. 1984) ("No denial of due process occurs if *Brady* material is disclosed in time for its effective use at trial.") (quoting *United States v. Higgs*, 713 F.2d 39, 44 (3rd Cir. 1983), *cert. denied*, 464 U.S. 1048 (1984)).

to the defendant's guilt that did not otherwise exist.").

What we have in this case, therefore, is a sanction against the government for tardily producing certain "target" letters which, under *Brady*, the government may have had no obligation to produce at all. We simply cannot tell, without the benefit of a full trial record, whether the "target" letters were material within the meaning of *Brady*. *See United States v. Kubiak*, 704 F.2d 1545, 1550 (11th Cir.), *cert. denied*, 464 U.S. 852, 78 L. Ed. 2d 149, 104 S. Ct. 163 (1983) (*Brady* not violated by untimely disclosure of co-conspirator statement, which was utilized at trial, because the focus of due process violation is "not upon the fact of nondisclosure, but upon the impact of nondisclosure on the jury's verdict."); *United States v. Starusko*, 729 F.2d 256, 262 (3rd Cir. 1984) (since "there can be no violation of *Brady* unless the government's non-disclosure infringes the defendant's fair trial right," precluding key government witness from testifying as sanction for non-disclosure of *Brady* material was abuse of discretion). Unless *Brady* mandated production of these letters, Rule 16(a)(2) made them non-producible; if the letters were non-producible, the government could hardly be sanctioned for doing what it was legally entitled to do, *i.e.*, not producing them. Certainly, the government could not be sanctioned for simply producing the letters late, without any showing of prejudice to the defendants.

I would hold that *Brady* does not create a right to pretrial discovery in criminal cases and that the government violated no *Brady* obligation in this case. Because no sanction, in my opinion, was appropriate, I agree with the majority that the "draconian" sanction of excluding twenty-five government witnesses was an abuse of discretion.[11]

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[11] Even if some sanction were appropriate, the exclusionary rule fashioned by the district court was, in my view, too harsh. As noted in the majority opinion, the district court found that the tardy production here was not the result of bad faith. The Supreme Court has discussed the costs and benefits of the exclusionary rule for Fourth Amendment violations in terms which appear to me to be equally applicable to this case:

Whether the exclusionary sanction is appropriately

imposed in a particular case . . . must be resolved by weighing the costs and benefits of preventing the use in the prosecution's case in chief of inherently trustworthy . . . evidence .

. . . .

The substantial social costs exacted by the exclusionary rule . . . have long been a source of concern. Our cases have consistently recognized that unbending application of the exclusionary sanction to enforce ideals of governmental rectitude would impede unacceptably the truth-finding functions of judge and jury. An objectionable collateral consequence of this interference with the criminal justice system's truth-finding function is that some guilty defendants may go free or receive reduced sentences as a result of favorable plea bargains. Particularly when law enforcement officers have acted in objective good faith or their transgressions have been minor, the magnitude of the benefit conferred on such guilty defendants offends basic concepts of the criminal justice system. Indiscriminate application of the exclusionary rule, therefore, may well generate disrespect for the law and administration of justice.

United States v. Leon, 468 U.S. 897, 906-08, 82 L. Ed. 2d 677, 104 S. Ct. 3405 (1984) (internal quotation marks and citations omitted).

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 99-10531

UNITED STATES OF AMERICA
Plaintiff – Appellant

V.

BOYCE MARK GARRETT; LARRY DON KEITH; KENNETH VERNON RYDEEN; JIMMY DALE SULLIVAN; MICHAEL DEAN WOODARD; STEVEN CRAIG FINKLEA; AUSTEEN HARRIS KEITH; DALE ZANE KEITH; GLENN DALE WILCOX
Defendants – Appellees

Appeal from the United States District Court for the Northern District of Texas, Fort Worth

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ON PETITION FOR REHEARING AND REHEARING EN BANC

(Opinion 12/29/00, 5 Cir., _____, _____ F.3d _____)

Before HIGGINBOTHAM, and DeMOSS, Circuit Judges, and FISH*, District Judge.

PER CURIAM:

(X)The Petition for Rehearing is DENIED and no member of this panel nor judge in regular active service on the court

having requested that the court be polled on Rehearing En Banc, (Fed. R. App. P. and 5th Cir. R. 35) the Petition for Rehearing En Banc is also DENIED.

( ) The Petition for Rehearing is DENIED and the court having been polled at the request of one of the members of the court and a majority of the judges who are in regular active service not having voted in favor, (Fed. R. App. P. and 5th Cir. R. 35) the Petition for Rehearing en Banc is also DENIED.

( ) A member of the court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor, Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/Harold R. DeMoss
United States Circuit Judge

U.S. Court of Appeal
FILED
FEB 14 2001
CHARLES R.
FULBRUGE III
CLERK

*District Judge of the Northern District of Texas, sitting by designation

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

United States Of America	§	
	§	
VS.	§	Action No. 4:98-CR-109-Y
	§	
	§	
Boyce Mark Garrett (10)	§	
Larry Don Keith (16)	§	
Kenneth Vernon Rydeen (21)	§	
Jimny Dale Sullivan (24)	§	
Michael Dean Woodard (27)	§	
Steven Craig Finklea (30)	§	
Austeen Harris Keith (31)	§	
Dale Zane Keith (32)	§	
Glenn Dale Wilcox (33)	§	

ORDER STRIKING CERTAIN GOVERNMENT WITNESSES

Pending before the Court are the following motions:

(1) Larry Don Keith's April 1, 1999 Motion to Dismiss and Brief;

(2) Austeen Harris Keith's April 2 Second Motion to Dismiss for *Brady* Violations and Supporting Brief;

(3) Dale Zane Keith's April 2 Motion to Dismiss and Brief;

(4) Kenneth Vernon Rydeen's April 5 Second Motion to Dismiss for *Brady* Violations and Supporting Brief;

(5) Michael Dean Woodard's April 5 Motion to Dismiss for *Brady* Violations; and

(6) The government's April 6 Motion for Reconsideration of Court's Ruling Striking Government Witnesses.

After consideration of these motions, the responses thereto, the record in this cause, and the argument and testimony presented at the hearing held on April 5 and 6, the Court finds that Defendants' motions should be partially granted and the government's motion should be denied.

Defendants' motions complain that the government has again tardily produced *Brady* information to the defense. Specifically, Defendants' motions contend that on April 1, two business days before the April 5 trial date, the government produced almost one hundred pages of documents. Included within the April 1 production were so-called "target letters" as to fifteen of the witnesses listed on the government's latest witness list. At the April 5 hearing on Defendants' Motions to Dismiss, Defendants further alleged that, after Defendants' Motions to Dismiss were filed, the government produced an additional stack of documents measuring about eight inches high, the vast majority of which documents were not produced until the morning of the April 5 trial date. Included in this production were target letters regarding some of the government's witnesses. Defendants contend that these productions were untimely under the Court's orders. Defendants further contend that because of the government's previous failures to timely produce documents, the indictment should be dismissed or, alternatively, the government's witnesses should be stricken.[1] After carefully reviewing the parties' written submissions, the arguments of counsel, and the record in this cause, the Court agrees that the striking of certain government witnesses is warranted.

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[1] Some of Defendants' motions request only dismissal, others request dismissal or, alternatively, that the Court strike government witnesses as to whom information was tardily produced. At the April 5 hearing, the Court permitted all defendants to join in these motions.

Review of the record reveals that on March 12, the Court ordered the government to produce to the defense certain letters, referred to during the hearings as "target letters," no later than March 17. Specifically, the March 12 order provided as follows:

> It is further ORDERED that no later than 4:30 p.m. on March 17, 1999, the government shall produce to each defendant copies of any letters from government counsel or its agents attempting to secure testimony from or against any person who will be testifying in the government's case-in-chief.

(March 12, 1999 Order Partially Granting Pending Motions and Modifying Certain Paragraphs of Scheduling and Pretrial Order at 3) ("the March 12 Order"). The March 12 Order was precipitated by various defense motions requesting, inter alia, a continuance of the then-existing March 15 trial date on the grounds that the government had failed to produce documents, including the target letters, for which production was required under *Brady V. Maryland*, 373 U.S. 83 (1963), and its progeny. The Court held a hearing regarding those motions on March 11 and concluded that the target letters were *Brady* impeachment material and should be produced. As a result, the March 12 Order required their production no later than March 17.[2]

The motions triggering the March 12 Order further complained that the government had produced approximately five hundred pages of material containing *Brady* information within the two-week period prior to the March 15 trial date. At the time of the March 11 hearing, it

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[2] Thus, even assuming the government did not realize that the letters were *Brady* impeachment material required to be produced by February 12 under paragraph two of the January 28 Second Amended Scheduling Order and Pretrial Order, and even assuming the repeated requests for those letters from defense counsel did not alert the government to the fact that the letters might be required to be produced under *Brady* and its progeny, the government was fully aware as of the March 12 Order that the Court had concluded the letters constituted *Brady* impeachment material that should be produced.

was not entirely clear to the Court exactly what these five hundred pages consisted of and whether they actually contained *Brady* information to the extent alleged by the defense. It became clear at the March 11 hearing, however, that the government had failed to timely produce special agent James Reid's investigative notes and screening questionnaires containing, as the government's counsel admitted, *Brady* material that should have been produced prior to the February 12 *Brady* information deadline imposed by the Court's Second Amended Scheduling Order and Pretrial Order of January 28 ("the January 28 Order" or "the scheduling order"). In any event, because the Court was unsure exactly what documents had been produced during the two-week period prior to the March 15 trial date and the extent to which they contained *Brady* information, the March 12 Order required the defense to file a joint "Request for Relief Under *Brady*" no later than March 22. Nevertheless, because of the volume of documents produced by the government in the two-week period prior to trial, and in order to afford all parties and the Court an opportunity to review those documents and address all issues raised by their production, the Court concluded that a continuance was required.[3] As a result, the March 12 order also

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[3] Obviously, production of *Brady* material two weeks before the trial date does not necessitate a continuance in every case. In fact, the Court suspects that in the majority of run-of-the-mill, single-defendant criminal cases, production of *Brady* material two weeks before trial might even be appreciated by the defense, rather than condemned. The problem here, however, is that this simply is not the run-of-the-mill criminal case. It involves a large number of defendants remaining to be tried, an even larger number that were indicted, a large volume of documents, detailed mathematical and statistical evidence, and allegations of multiple criminal conspiracies. As a result, this case is more complex than the average criminal case and therefore requires a greater amount of pretrial preparation on all counsels' part. Consequently, the Court determined that it simply would be unfair to require the defense to proceed to trial as scheduled when the government essentially inundated them with a large volume of documents within the two-week period preceding the trial date, some of which

continued the trial date until April 5 and extended the deadlines for Defendants to submit the exhibit notebooks and file the exhibit lists required by paragraphs fourteen and sixteen of the January 28 Order.

As ordered, Defendants filed their Joint Motion for Relief under *Brady* by the March 22 deadline, and the government filed a response on March 26. On April 1, the Court issued an order denying the motion ("the April 1 Order"). The April 1 Order indicated that the Court had concluded that much of the information about which Defendants complained was not required to be produced under *Brady*. Nevertheless, the Court expressed its concern about the government's production of Reid's investigative notes and screening questionnaires, much of which unquestionably contained *Brady* material, almost two weeks past the scheduling order's deadline and only slightly more than two weeks prior to the trial date. The Court concluded, however, that any potential constitutional problems with the untimely production had been cured by the three-week continuance granted in the March 12 Order. Nevertheless, the Court indicated that it had seriously considered striking the government's witnesses as a sanction for failing to comply with the scheduling order, but had concluded that such a sanction would be a harsher remedy than was warranted. The Court warned the government, however, that the Court would "be less lenient regarding any future government violations of the scheduling order." (April 1 Order at 3.)

Apparently simultaneously with the issuance of this warning, the government was in the midst of commencing

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contained *Brady* impeachment evidence. And, even assuming the documents did not contain *Brady* information, a continuance might nevertheless have been required simply to afford the defense an adequate opportunity to review the documents and ensure that they did not contain such information. After all, the mere fact that the government has produced documents forces effective defense counsel to review them.

another untimely production of documents on the eve of trial. The government admitted during the April 5 hearing that its April productions included target letters that should have been produced by the March 17 deadline established in the March 12 Order. As a result, the Court concluded that any witness as to whom target letters were required to be produced by March 17 but that were not produced until after that date should be stricken. The Court recessed the hearing so the government and defense counsel could attempt to agree on which government witnesses were covered by the Court's decision.

On April 6, the hearing resumed. By that time, the government had filed its Motion for Reconsideration of Court's Ruling Striking Government Witnesses. The motion indicates that "[t]he government and defense agree that late document production was made on twenty-five (25) witnesses." The parties disputed the timeliness of the government's production as to an additional eighteen government witnesses. At the hearing, the Court required the government to specify the names of the twenty-five witnesses as to whom the parties were in agreement that untimely production had been made, and the Court ordered that those twenty-five witnesses be stricken.[4]

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[4] At the hearing, the government requested leave to put additional evidence in the record regarding the large volume of documents that it had timely produced, apparently to show that its untimely production of documents did not adversely impact defense counsel's trial strategy and that the government had acted in good faith. The Court does not question the government's good faith, however. Obviously, if the Court believed the government had acted in bad faith, the remedy imposed would have been even harsher. But the Court believes that, in light of all the circumstances of this case, the remedy chosen is appropriate even assuming the government acted in good faith. Similarly, even assuming the government's untimely production ultimately would not have adversely impacted the defense's trial strategy, it nonetheless unquestionably adversely impacted the organized and efficient preparation for trial by defense counsel and, for that matter, the Court. Neither the defense nor the Court should be forced to continue to suffer the government's last-minute

In deciding to strike these witnesses, the Court was mindful of several things, first and foremost being the strong admonishment the Court issued in its April 1 order. The government was already afforded one "slap-on-the-hand" warning, and that proved to be insufficient. Now the remedy for the government's additional violation of the Court's orders must be more severe. And, in assessing the severity of that remedy, the Court recalls that it was in a very similar situation immediately preceding the March 15 trial date, at which time the Court determined that a continuance was necessary to avoid any prejudice to the defense as a result of the government's untimely, eve-of-trial production.[5] The Court is again faced with virtually the same situation.

Yet another continuance of the trial date to avoid any possible prejudice to the defense is simply not a viable option. The Court cannot continue to protect the defendants' rights and remedy the government's mistakes, even if unintentional, by granting additional continuances, if for no other reasons than the problems that would cause to the Court's schedule and the resulting prejudice to other cases that must be continued in order to find another date for the trial of this case.[6] Of course, the Court must also consider the potential problems additional continuances might pose for Defendants and their counsel. And refusing to grant a

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production of documents and the resulting motions and hearings the untimely productions have caused, particularly when those untimely productions have come on days immediately preceding, and even the day of, trial. Indeed, that is exactly what the court-imposed deadlines are designed to prevent.

[5] Indeed, in the April 1 Order, the Court noted that "[c]ontinued violations of the scheduling order's disclosure deadlines would wreak havoc on defense counsel's and the Court's ability to efficiently prepare for trial and, as a result, might require additional continuances of the trial date." (April 1 Order at 2.)

[6] In this regard, the Court notes that in order to continue this trial from March 15 to April 5, it was forced to continue to October a trial in an almost two-year-old civil case that had been specially set for trial on April 5 six months ago.

brief continuance is also untenable, as it is simply unfair to expect the defense to proceed to trial after having been presented, for the second time, with a large number of documents on the eve of trial, indeed, the very day trial was scheduled to commence.

Furthermore, the government has had more than ample time to finalize its trial preparations and ensure that all required information has been produced, given that the trial date in this case has already been continued several times. In light of all the time the government has had to prepare its case for trial, the fact that it continues to deliver documents to defense counsel that were ordered to be produced weeks ago, at a time when defense counsel should be engaged in the last-minute requirements of pretrial preparation, is simply inexcusable. The Court would not permit such conduct by defense counsel, and the government, which is seeking to deny these defendants their liberty, certainly should be held to no lesser standard.[7]

The Court recognizes that its chosen remedy is a severe one. The Court did not grant the dismissal requested by the defense, but realizes that its decision to strike these witnesses may effect the same result.[8] Nevertheless, the Court is concerned with fashioning the most appropriate remedy in light of all the circumstances. Had this been the first instance of tardy production, this remedy would be too

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[7] Indeed, the Court has held defense counsel to the deadlines established in the Court's orders when their failure to meet those deadlines was not precipitated by the last-minute production of information by the government. *See* March 30 Order Denying Motion for Reconsideration and Motions for Extension; April 2 Order Denying Motion for Reconsideration.

[8] This was not apparent, however, when the Court first ruled that witnesses as to whom target letters had not been produced would be stricken. The government itself estimated that a maximum of thirteen witnesses might be impacted. It is only because of the wholesale nature of the government's failure to produce that the number of witnesses impacted (and stricken) has grown to twenty-five and that the Court's sanction has now become tantamount to dismissal.

severe. But this is not the first time the Court has grappled with this issue. The Court has considered less severe sanctions, such as a monetary sanction, but finds that such a remedy would simply be insufficient. The most effective sanction the Court can impose, and the one that seems to the Court to be specifically tailored to the wrong, is striking the witnesses as to whom late production was made.

It is, therefore, ORDERED that Defendants' motions listed above are hereby PARTIALLY GRANTED, in that the following witnesses are stricken from the government's witness list and shall not be permitted to testify at the trial of this cause:

(1) Jimmy Junior Birmingham
(2) Cletius Brown
(3) Michael Colley
(4) Charlie Lewis Crone
(5) Darrell Wayne Edwards
(6) Nathan Greene
(7) Horace L. Hobbs
(8) Melvin Loralle Hoover
(9) Kevin Dale Horton
(10) Jesse Clarence Johnson
(11) Johnny Mack Johnson
(12) Bobby Dale Lappin, Jr.
(13) Dennis Gregg Morris
(14) Thomas Eugene Pace
(15) Donnie Ray Pipkin
(16) Roger Clay Price
(17) Danny Ragsdale
(18) Jerry Dan Reynolds
(19) Ronnie Wayne Rogers
(20) Michael Shane Russom
(21) Jerry Don Simpson
(22) Michael Ray Teel
(23) Ralph S. Thompson
(24) Marcus D. Wallis
(25) Jackie R. Watkins

Defendants' motions shall remain pending to the extent they request similar relief as to the eighteen witnesses for which there was no agreement about the timeliness of the government's production.[9]

It is further ORDERED that, in the event the government does not file a timely appeal of this order, an evidentiary hearing will be held at 1:30 p.m. on Monday, May 17, 1999 to determine whether the remaining eighteen witnesses for which there was no agreement regarding the timeliness of the government's production should be stricken.

It is further ORDERED that the government's April 6 Motion for Reconsideration of Court's Ruling Striking Government Witnesses is hereby DENIED.

SIGNED April 9, 1999.

/s/ Terry R. Means
Terry R. Means
United States District Judge

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[9] As a result, because an evidentiary hearing will be required to resolve this portion of the Defendants' motions, any time from the filing of Defendants' motions to the conclusion of the evidentiary hearing thereon is excludable from Speedy Trial Act calculations. *See* 18 U.S.C.A. § 3161(h)(l)(F) (West 1985); *Henderson V. United States*, 476 U.S. 321, 332 (1986).

Rule 16. Discovery and Inspection

(a) Governmental Disclosure of Evidence.

(1) Information Subject to Disclosure.

(A) Statement of Defendant. Upon request of a defendant the government must disclose to the defendant and make available for inspection, copying, or photographing: any relevant written or recorded statements made by the defendant, or copies thereof, within the possession, custody, or control of the government, the existence of which is known, or by the exercise of due diligence may become known, to the attorney for the government; that portion of any written record containing the substance of any relevant oral statement made by the defendant whether before or after arrest in response to interrogation by any person then known to the defendant to be a government agent; and recorded testimony of the defendant before a grand jury which relates to the offense charged. The government must also disclose to the defendant the substance of any other relevant oral statement made by the defendant whether before or after arrest in response to interrogation by any person then known by the defendant to be a government agent if the government intends to use that statement at trial. Upon request of a defendant which is an organization such as a corporation, partnership, association or labor union, the government must disclose to the defendant any of the foregoing statements made by a person who the government contends (1) was, at the time of making the statement, so situated as a director, officer, employee, or agent as to have been able legally to bind the defendant in respect to the subject of the statement, or (2) was, at the time of the offense, personally involved in the alleged conduct constituting the offense and so situated as a director, officer, employee, or agent as to have been

able legally to bind the defendant in respect to that alleged conduct in which the person was involved.

(B) Defendant's Prior Record. Upon request of the defendant, the government shall furnish to the defendant such copy of the defendant's prior criminal record, if any, as is within the possession, custody, or control of the government, the existence of which is known, or by the exercise of due diligence may become known, to the attorney for the government.

(C) Documents and Tangible Objects. Upon request of the defendant the government shall permit the defendant to inspect and copy or photograph books, papers, documents, photographs, tangible objects, buildings or places, or copies or portions thereof, which are within the possession, custody or control of the government, and which are material to the preparation of the defendant's defense or are intended for use by the government as evidence in chief at the trial, or were obtained from or belong to the defendant.

(D) Reports of Examinations and Tests. Upon request of a defendant the government shall permit the defendant to inspect and copy or photograph any results or reports of physical or mental examinations, and of scientific tests or experiments, or copies thereof, which are within the possession, custody, or control of the government, the existence of which is known, or by the exercise of due diligence may become known, to the attorney for the government, and which are material to the preparation of the defense or are intended for use by the government as evidence in chief at the trial. (E) Expert Witnesses. At the defendant's request, the government shall disclose to the defendant a written summary of testimony the government intends to use under Rules 702, 703, or 705 of the Federal Rules of Evidence during its case in chief at trial. If the government requests discovery under subdivision (b)(1)(C)(ii) of this rule and the defendant

complies, the government shall, at the defendant's request, disclose to the defendant a written summary of testimony the government intends to use under Rules 702, 703, or 705 as evidence at trial on the issue of the defendant's mental condition. The summary provided under this subdivision shall describe the witnesses' opinions, the bases and the reasons for those opinions, and the witnesses' qualifications.

(2) *Information Not Subject to Disclosure.* Except as provided in paragraphs (A), (B), (D), and (E) of subdivision (a)(1), this rule does not authorize the discovery or inspection of reports, memoranda, or other internal government documents made by the attorney for the government or any other government agent investigating or prosecuting the case. Nor does the rule authorize the discovery or inspection of statements made by government witnesses or prospective government witnesses except as provided in 18 U.S.C. Sec. 3500.

(3) Grand Jury Transcripts. Except as provided in Rules 6, 12(i) and 26.2, and subdivision (a)(1)(A) of this rule, these rules do not relate to discovery or inspection of recorded proceedings of a grand jury.

(b) The Defendant's Disclosure of Evidence.

(1) *Information Subject to Disclosure.*

(A) Documents and Tangible Objects. If the defendant requests disclosure under subdivision (a)(1)(C) or (D) of this rule, upon compliance with such request by the government, the defendant, on request of the government, shall permit the government to inspect and copy or photograph books, papers, documents, photographs, tangible objects, or copies or portions thereof, which are within the possession, custody, or control of the defendant and which the defendant intends to introduce as evidence in chief at the trial.

(B) Reports of Examinations and Tests. If the defendant requests disclosure under subdivision (a)(1)(C) or (D) of this rule, upon compliance with such request by the government, the defendant, on request of the government, shall permit the government to inspect and copy or photograph any results or reports of physical or mental examinations and of scientific tests or experiments made in connection with the particular case, or copies thereof, within the possession or control of the defendant, which the defendant intends to introduce as evidence in chief at the trial or which were prepared by a witness whom the defendant intends to call at the trial when the results or reports relate to that witness' testimony.

(C) Expert Witnesses. Under the following circumstances. the defendant shall, at the government's request, disclose to the government a written summary of testimony that the defendant intends to use under Rules 702, 703, or 705 of the Federal Rules of Evidence as evidence at trial: (i) if the defendant requests disclosure under subdivision (a)(1)(E) of this rule and the government complies, or (ii) if the defendant has given notice under Rule 12.2(b) of an intent to present expert testimony on the defendant's mental condition. This summary shall describe the witnesses' opinions, the bases and reasons for those opinions, and the witnesses' qualifications.

(2) *Information Not Subject to Disclosure*. Except as to scientific or medical reports, this subdivision does not authorize the discovery or inspection of reports, memoranda, or other internal defense documents made by the defendant, or the defendant's attorneys or agents in connection with the investigation or defense of the case, or of statements made by the defendant, or by government or defense witnesses, or by prospective

government or defense witnesses, to the defendant, the defendant's agents or attorneys.

(c) Continuing Duty To Disclose. If, prior to or during trial, a party discovers additional evidence or material previously requested or ordered, which is subject to discovery or inspection under this rule, such party shall promptly notify the other party or that other party's attorney or the court of the existence of the additional evidence or material.

(d) Regulation of Discovery.

(1) *Protective and Modifying Orders.* Upon a sufficient showing the court may at any time order that the discovery or inspection be denied, restricted, or deferred, or make such other order as is appropriate. Upon motion by a party, the court may permit the party to make such showing, in whole or in part, in the form of a written statement to be inspected by the judge alone. If the court enters an order granting relief following such an ex parte showing, the entire text of the party's statement shall be sealed and preserved in the records of the court to be made available to the appellate court in the event of an appeal.

(2) *Failure To Comply With a Request.* If at any time during the course of the proceedings it is brought to the attention of the court that a party has failed to comply with this rule, the court may order such party to permit the discovery or inspection, grant a continuance, or prohibit the party from introducing evidence not disclosed, or it may enter such other order as it deems just under the circumstances. The court may specify the time, place and manner of making the discovery and inspection and may prescribe such terms and conditions as are just.

(e) Alibi Witnesses. Discovery of alibi witnesses is governed by Rule 12.1.